STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Jansen, PJ., Fort Hood and Gleicher, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	Supreme Court No. 139969
vs.	Court of Appeals No. 287033
DONALD ALLEN LOWN, Defendant-Appellant.	Circuit Court Case No. 05-026696-FH-3

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The People agree with the Defendant-Appellant[1] that this Court now has jurisdiction in this matter.

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[1] (DB, iii)

COUNTERSTATEMENT OF QUESTION INVOLVED

Does the record reflect a good-faith effort to bring Defendant's case to trial in a timely manner, with no violation of his rights under the statutory 180-day rule?

The trial court answered "YES".
The Court of Appeals Answered "YES".
The Plaintiff-Appellee contends that the Answer is "YES".
The Defendant-Appellant contends that the Answer is "NO".

COUNTERSTATEMENT OF FACTS

The only thing which the People have to add to the Defendant-Appellant's statement of facts[2] at this juncture is that he was sentenced by the Honorable Fred L. Borchard, Circuit Court Judge, nearly five months ago on May 12, to a prison term of nine to fifteen years. (4b) This sentence was made consecutive to the one Defendant was already serving, so he received no credit for any time which he had previously served. (Id) On June 21, Defendant's request for the appointment of appellate counsel was forwarded to Saginaw County's Office of Assigned Counsel. (5b) On August 5, a claim of appeal and an order appointing the State Appellate Defender Office as defense counsel were entered on Defendant's behalf. (Id) As of this time, that appeal is still in the production of transcripts stage. (Id)

With that, the People will conclude this part of their brief by noting that additional facts are stated *infra,* in the argument section of this brief, as part of an effort aimed at providing the Court with adequate responses to the matters the Court has indicated it has an interest in having the parties address.

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[2] (Defendant's Brief--DB, 1-13)

ARGUMENT I

THE RECORD REFLECTS A GOOD-FAITH EFFORT TO BRING DEFENDANT'S CASE TO TRIAL IN A TIMELY MANNER, WITH NO VIOLATION OF HIS RIGHTS UNDER THE STATUTORY 180-DAY RULE.

A. Defendant's Claim

In this appeal, it is contended that

> "the charges against Defendant Lown must be dismissed with prejudice because the trial court lost jurisdiction to try him, pursuant to the 180-day rule, MCL 780.131 and MCL 780.133." (DB, 14)

B. Preservation of Issue

The People have no quarrel with the Defendant's assertion that he raised this claim of error a number of times, in a number of ways, in the trial court. (DB, 20ff)

C. Standard of Review

The People accept Defendant's statement of the standard so far as he categorizes it as de novo. (DB, 14) The remainder of Defendant's statement, however, amounts to a summary of pertinent legal principles which goes well beyond what the People believe this Court had in mind in requiring such statements in briefs.[3] At the same time, the People would wish to add that to the extent there are factual findings of the trial court to review here, those are reviewed for clear error.[4]

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[3] That having been said, the People wish to mention that they have no particular quarrel with the substance of Defendant's summary of law.

[4] *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

D. Pertinent Principles of Law

The goal when interpreting a statute is to ascertain and give effect to the intent of the Legislature starting with the plain language of the statute and reasonable inferences from the words used in the statute.[5] Where the language is unambiguous, no further construction is necessary, and the statute is enforced as written.[6] The words used by the legislature must be given their common ordinary meaning.[7]

The statutory remedy under the 180-day rule in issue here is set forth under MCL 780.133, which provides for dismissal if "[i]n the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter". The language of the statutory remedy refers to the action not being "commenced" - it does not say if trial is not commenced or if a jury is not picked. Therefore, the People maintain that the action has been commenced for purposes of the 180 day rule when the People are ready to proceed and are making good-faith efforts to move the case along, and the case has been set or called for trial.[8] Delays and

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[5] *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002); *People v McIntire*, 461 Mich 147, 152; 599 NW2d 102 (1999).

[6] *People v Adkins*, 272 Mich App 37, 39; 724 NW2d 710 (2006).

[7] *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); MCL 8.3a.

[8] See *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959); *People v Davis*, 283 Mich App 737, 741-744; 769 NW2d 278 (2009).

adjournments at defense request do not serve to put the statute into operation, and cannot be allowed to contribute to a dismissal of charges.[9]

In the alternative, the People would note that a deviation from a legal rule is error, *unless* the rule has been waived. A waiver extinguishes any error.[10] As the Court noted in *Carter*, it is presumed that waiver is available in relation to a broad array of constitutional and statutory provisions.[11] A defendant's right to a speedy trial under MCL 780.131 may be waived, where the case stands ready for trial within 180 days, but the defendant's delaying motions or requests cause sufficient delay to preclude trial from beginning before the applicable time period expires.[12]

Another alternative is the rule of forfeiture by wrongdoing. Forfeiture by wrongdoing extinguishes claims a defendant seeks to assert.[13] The rule is premised upon equitable grounds.[14]

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[9] *Hendershot, supra* at 304; *Davis, supra* at 742.

[10] *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000).

[11] *Id.* at 218.

[12] That would seem to be the clear implication of *Hendershot, supra* at 304; *Davis, supra* at 742.

[13] See *Crawford v Washington*, 541 US 36, 62; 124 S Ct 1354, 1370; 158 L Ed 2d 177 (2004).

[14] *Id.;* see also *People v Jones*, 270 Mich App 208; 714 NW2d 362 (2006).

E. Relevant Facts and Discussion

The People submit that they have prosecuted this case as expeditiously as possible in light of the existing rules and scheduling practices of the tenth circuit court of Saginaw County. They have been prepared to proceed at each trial setting, as reflected by the circuit court docket entries. Furthermore, the People would represent that the complaining witnesses in this home invasion case had appeared for every hearing scheduled in this case through the end of 2007. As victims, they are perhaps even more frustrated with the way in which this case failed to proceed than the Defendant professes to have been.

The People would thus assert that most of the lack of progress in this matter can be laid at Defendant's own feet. For example, this case was stayed for roughly two years while Defendant pursued this wild goose chase of an appeal.[15] The rest have been due to scheduling conflicts in the circuit court—none can be attributed to the People.

Allowing Defendant to benefit from the delay caused by his repeated requests for new counsel and by his counsel's requests for time would allow him to manipulate the system - a clearly inequitable result. The doctrine of forfeiture by wrongdoing should be applied to prevent such an injustice.

In any event, the People have always been ready to proceed in this matter, and remain so. This case therefore should not be dismissed[16]—at most the Court

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[15] See the circuit court docket entry for April 15, 2008. (27a-28a)

[16] See MCL 780.131; MCL 780.133; *Hendershot, supra; Davis, supra.*

should select some alternative method of encouraging compliance with the 180-day rule in the future. The victims, the prosecuting attorney, the Defendant and his attorney, the People of the State of Michigan, and the truth-seeking process itself should not be made to pay for the nettlesome scheduling problems of trial courts, which have no logical connection to a defendant's guilt or innocence.

Turning then to the questions posed by the Court in granting leave in this case, the People would endorse the answers to them and the supporting reasoning found in the ably written amicus brief filed by Mr. Baughman on behalf of the Prosecuting Attorney Association of Michigan. In turn, it is clear that Chief Justice Dethmers in his unanimous opinion in *Hendershot* got the answers to the Court's current questions right over fifty years ago, and provided the basis for Mr. Baughman's argument. In sum, the Court here seems to be asking whether *Hendershot* should be overruled, at least to some extent. The People's answer to that question is "No".

The People would further throw out for the Court's consideration the proposition that the issues raised by the Court have been rendered moot, at least with respect to this case, by the trial of Defendant, and his resultant conviction and sentence. Defendant has supposedly always wanted a trial in this matter, and now he has had one. The appellate courts of this State should turn their attention to what happened in those proceedings, but not alter them on the basis of the time it took to get to them. Defendant is not entitled to any relief from this Court under the statutory 180-day rule.

F. Conclusion

The People thus ask this Honorable Court to find no error under this issue.

SUMMARY AND RELIEF SOUGHT

Wherefore, the Plaintiff-Appellee respectfully requests that this Honorable Court affirm the unpublished Per Curiam Opinion of the Court of Appeals, which affirmed the trial court's ruling on the 180-day issue.

Respectfully submitted,

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Dated: September 29, 2010

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